445B

(24)

No. 05-1256

FILED
SEP 15 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

PHILIP MORRIS USA Inc.,
Petitioner,

v.

MAYOLA WILLIAMS,
Respondent.

On Writ of Certiorari to the Supreme Court of Oregon

BRIEF OF THE CAMPAIGN FOR TOBACCO-FREE KIDS, AMERICAN CANCER SOCIETY, AMERICAN HEART ASSOCIATION, AMERICAN COLLEGE OF CHEST PHYSICIANS, AMERICAN COLLEGE OF OCCUPATIONAL AND ENVIRONMENTAL MEDICINE, AMERICAN ASSOCIATION FOR RESPIRATORY CARE, AMERICAN DENTAL HYGIENISTS' ASSOCIATION, AMERICAN LEGACY FOUNDATION, AMERICAN LUNG ASSOCIATION, AMERICAN PUBLIC HEALTH ASSOCIATION, AMERICAN SOCIETY OF ADDICTION MEDICINE, AMERICAN THORACIC SOCIETY, LUNG CANCER ALLIANCE, NATIONAL ASSOCIATION OF LOCAL BOARDS OF HEALTH, NATIONAL RESEARCH CENTER FOR WOMEN AND FAMILIES, NATIONAL LATINO COUNCIL ON ALCOHOL AND TOBACCO, AND SOCIETY FOR RESEARCH ON NICOTINE AND TOBACCO, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

WILLIAM B. SCHULTZ *
ANDREW N. GOLDFARB
ZUCKERMAN SPAEDER LLP
1800 M Street, N.W.
Washington, D.C. 20036
(202) 778-1800

* Counsel of Record

Attorneys for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTERESTS OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

THE EXTRAORDINARILY REPREHENSIBLE NATURE OF PHILIP MORRIS'S CONDUCT SUPPORTS THE PUNITIVE DAMAGE AWARD BELOW 5

A. PHILIP MORRIS PURSUED AN INTENTIONAL CAMPAIGN OF FRAUD AND DECEIT RELATING TO THE HEALTH EFFECTS OF SMOKING AND THE ADDICTIVENESS OF SMOKING FOR NEARLY 50 YEARS 7

1. Philip Morris's Statements Made During the Second Half of the Twentieth Century Denying That Smoking Was a Proven Cause of Disease Were Fraudulent. 8

2. Philip Morris Publicly Denied That Smoking and Nicotine Are Addictive While Intentionally Exploiting Nicotine's Addictive Properties to Keep People Smoking 16

B. PHILIP MORRIS'S CONDUCT CAUSED PHYSICAL HARM AND EVINCED EXTREME DISREGARD FOR THE HEALTH OF OTHERS 23

CONCLUSION 30

APPENDIX A A-1

TABLE OF AUTHORITIES

CASES

BMW of N. Am., Inc. v. Gore,
517 U.S. 559 (1996) 2, 5, 6, 23, 30

FDA v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000) 3

State Farm Mut. Auto. Ins. Co. v. Campbell,
538 U.S. 408 (2003) 2, 5, 6, 23, 30

TXO Prod'n Corp. v. Alliance Res. Corp.,
509 U.S. 443 (1993) 23

United States v. Philip Morris USA Inc., et al.,
Civ. No. 99-2496 (GK), 2006 WL 2380622 (D.D.C.
Aug. 17, 2006) (part 1 of 6) 7

United States v. Philip Morris USA Inc., et al.,
Civ. No. 99-2496 (GK), 2006 WL 2380632 (D.D.C.
Aug. 17, 2006) (part 2 of 6) 13

REGULATIONS

Nicotine in Cigarettes and Smokeless Tobacco Is a Drug and These Products Are Nicotine Delivery Devices under the Federal Food, Drug, and Cosmetic Act: Jurisdictional Determination, 61 Fed. Reg. 44619, 44833-34
(Aug. 28, 1996) 26

MISCELLANEOUS

American Cancer Society, *Cancer Facts & Figures 1999*
(1999) 25

American Cancer Society, *Cancer Facts & Figures 2005* (2005) 24, 25

Lynch, B. S., and R. J. Bonnie, eds., *Growing Up Tobacco Free – Preventing Nicotine Addiction in Children and Youths*, Committee on Preventing Nicotine Addiction in Children and Youths, Division of Biobehavioral Sciences and Mental Disorders, Institute of Medicine, National Academy Press, Washington, DC (1994) 25

U.S. Centers for Disease Control and Prevention, *Annual Smoking-Attributable Mortality, Years of Potential Life Lost, and Economic Costs – United States 1995-1999*, Morbidity and Mortality Weekly Report 51(14): 300-03 (Apr. 11, 2002) 24

U.S. Centers for Disease Control and Prevention, *Cigarette Smoking among Adults – United States, 1999*, Morbidity and Mortality Weekly Report, 50(40):869-72 (Oct. 12, 2001) 25

U.S. Centers for Disease Control and Prevention, *Smoking Cessation During Previous Year Among Adults – United States, 1990 and 1991*, Morbidity and Mortality Weekly Report, 42(26):504-507 (July 9, 1993) 26

U.S. Centers for Disease Control and Prevention, *State-Specific Prevalence of Current Cigarette Smoking Among Adults and the Proportion of Adults Who Work in a Smoke-Free Environment – United States, 1999*, Morbidity and Mortality Weekly Report, Vol. 45(43): 978-82 (Nov. 3, 2000) 25

U.S. Department of Health and Human Services, *The Health Consequences of Smoking: A Report of the Surgeon General -- 1975* (1975) 24

U.S. Department of Health and Human Services. *The Health Consequences of Smoking: A Report of the Surgeon General*. Atlanta, GA: U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, 2004..... 24

BRIEF OF THE CAMPAIGN FOR TOBACCO-FREE KIDS, AMERICAN CANCER SOCIETY, AMERICAN HEART ASSOCIATION, AMERICAN COLLEGE OF CHEST PHYSICIANS, AMERICAN COLLEGE OF OCCUPATIONAL AND ENVIRONMENTAL MEDICINE, AMERICAN ASSOCIATION FOR RESPIRATORY CARE, AMERICAN DENTAL HYGIENISTS' ASSOCIATION, AMERICAN LEGACY FOUNDATION, AMERICAN LUNG ASSOCIATION, AMERICAN PUBLIC HEALTH ASSOCIATION, AMERICAN SOCIETY OF ADDICTION MEDICINE, AMERICAN THORACIC SOCIETY, LUNG CANCER ALLIANCE, NATIONAL ASSOCIATION OF LOCAL BOARDS OF HEALTH, NATIONAL RESEARCH CENTER FOR WOMEN AND FAMILIES, NATIONAL LATINO COUNCIL ON ALCOHOL AND TOBACCO, AND SOCIETY FOR RESEARCH ON NICOTINE AND TOBACCO, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTERESTS OF AMICI CURIAE[1]

Amici are non-profit, public health organizations and professional medical societies that for decades have worked to address the devastating health and economic consequences of tobacco use in the United States. As an important part of that mission, *amici* have worked to counter the decades-long campaign of fraudulent public statements perpetrated on the American public by petitioner Philip Morris USA Inc.

---

[1] By way of blanket consents filed with the Clerk of this Court, all parties have consented to the filing of this brief. Pursuant to Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part. No person or entity other than *amici* made a monetary contribution to the preparation or submission of the brief.

("Philip Morris") and other major tobacco companies about the adverse health effects and addictiveness of smoking. Hence, *amici* are qualified to evaluate the reprehensibility of Philip Morris's conduct at issue in this case, which is the issue that they will address in this *amicus* brief.

The interests of *amici* are more fully set out in Appendix A.

SUMMARY OF ARGUMENT

This Court has repeatedly affirmed that the reprehensibility of a defendant's conduct is the most important consideration in assessing the reasonableness of a punitive damage award. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996). Under the factors that the Court has directed courts to use in evaluating the reprehensibility of a defendant's conduct, the evidence in this case describes a 45-year history of intentional wrongdoing by petitioner Philip Morris that is reprehensible to an extraordinary degree. Philip Morris engaged in this course of conduct with utter and reckless disregard for the health and safety of consumers. The scope and nature of physical harm that resulted from that total indifference for smokers' health is profound. All told, tobacco use causes an estimated 400,000 deaths annually in the United States, and is responsible, *inter alia*, for one in three deaths from cancer and one of every five deaths from heart disease.

From the publication of the "Frank Statement to Cigarette Smokers" in 448 newspapers nationwide in 1954, through Jesse Williams' death in 1997, through the jury verdict in this case in 1999, Philip Morris engaged in a multi-faceted campaign of deception. Philip Morris made false and misleading public statements about the health effects of

smoking; about what Philip Morris was doing to discover any adverse effects; about whether smoking is addictive and the role of nicotine in that addiction; and about its ability to control the delivery of nicotine to the smoker.

For decades, Philip Morris knew that most smokers start smoking before age 18 and acknowledged internally that cigarette smoking causes disease and death. Yet Philip Morris nevertheless marketed its cigarettes, especially its flagship Marlboro brand, to appeal to underage smokers, and designed them to ensure sufficient nicotine delivery to create and sustain nicotine addiction. While that strategy created millions of lifetime Philip Morris customers, made Marlboro the best-selling cigarette brand, and made Philip Morris the dominant cigarette company in the United States, it has caused enormous physical harm, suffering, and death. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000) ("[T]obacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States.").

At the time of the jury verdict in this case, Philip Morris had not yet publicly admitted what it acknowledged internally for more than 40 years – that smoking is a cause of disease; that smoking is an addiction primarily caused by the drug nicotine; and that Philip Morris developed and exploited the ability to control the amount and form of nicotine delivered by cigarettes.

During the second half of the Twentieth Century, Philip Morris zealously sought to preserve the market for cigarettes, maximize its profits, protect its litigation interests, and avoid meaningful product regulation. Because telling the truth to its customers and the public was an impediment to these goals, Philip Morris intentionally abandoned the truth. Instead, Philip Morris aimed its fraudulent public statements at every corner of the United States. Consistent with the

jury's finding in this case, Philip Morris's fraud has contributed substantially to the catastrophic health effects of smoking. *Amici* are many of the nation's leading tobacco control advocates, volunteer health agencies, independent tobacco research organizations, and health provider groups. These organizations and their members have been front-row witnesses to Philip Morris's conduct and first-line responders to its public health consequences in the State of Oregon and throughout the United States.

Amici have confined their submission to the reprehensibility of Philip Morris's conduct at issue here, and respectfully submit that the egregious nature of that conduct supports the decision below. The punitive damages awarded by the Oregon jury against Philip Morris in this case should be upheld.

ARGUMENT

Jesse Williams was a longtime smoker of Philip Morris's Marlboro brand of cigarettes. After he died of lung cancer in 1997, his estate brought suit in Oregon state court against Philip Morris, claiming fraud and negligence. After a trial in 1999, the jury found for the plaintiff and awarded $821,485 in compensatory damages and $79.5 million in punitive damages.

Philip Morris challenges the punitive damage award as a violation of due process under the legal parameters set forth in *State Farm*. In *State Farm*, the Court held that whether a punitive damage award is so excessive as to be unconstitutional depends upon (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm to the plaintiff and the punitive damages award; and (3) the difference between the punitive damage award at issue and the penalties

authorized or imposed in comparable cases. 538 U.S. at 418. As stated above, this brief addresses only the first *State Farm* guidepost – the reprehensibility of Philip Morris's conduct.

THE EXTRAORDINARILY REPREHENSIBLE NATURE OF PHILIP MORRIS'S CONDUCT SUPPORTS THE PUNITIVE DAMAGE AWARD BELOW.

This Court has repeatedly affirmed that reprehensibility of a defendant's conduct is the most important consideration in assessing the reasonableness of a punitive damage award. *State Farm*, 538 U.S. at 419; *Gore*, 517 U.S. at 575. In *State Farm*, the Court identified five factors for courts to consider in determining the reprehensibility of a defendant's conduct. According to the Court, reviewing courts must consider whether:

> the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

State Farm, 538 U.S. at 419 (citing *Gore*, 517 U.S. at 576-77). As we demonstrate below, when considered in light of these measures of reprehensibility, Philip Morris's conduct spanning five decades was extraordinarily egregious.[2]

---

[2] Only the "financial vulnerability" factor is not at issue in this case.

In Section A below, *amici* demonstrate that Philip Morris's conduct in this case meets the fourth and fifth *State Farm* guideposts of reprehensibility. Philip Morris's conduct involved repeated actions and caused harm that was the result of intentional malice and deceit. The company pursued a campaign of fraud over 45 years to mislead and to deceive the American public, including Jesse Williams, in two broad ways. First, since 1954, forward Philip Morris – both independently and in concert with other tobacco companies – has issued false public statements about whether smoking causes cancer and other disease, about its commitment to protect the health of its customers, and about its commitment to uncover any adverse health effects of smoking. Second, for decades Philip Morris – both independently and through representatives – publicly denied the addictiveness of smoking and of the nicotine delivered by cigarettes, concealing from the public its knowledge of nicotine's addictive properties and its extensive efforts to exploit those properties to keep people smoking.

In Section B, *amici* show that Philip Morris's conduct in this case also meets the first two measures of reprehensibility identified in *State Farm*. The injury caused by Philip Morris's conduct was physical, and Philip Morris exhibited profound and total indifference to the health and safety of others.

In short, the evidence in this case demonstrates that Philip Morris's campaign of deceit was "*especially* [and] *unusually* reprehensible." *See Gore*, 517 U.S. at 590 (Breyer, J., concurring).

A. PHILIP MORRIS PURSUED AN INTENTIONAL CAMPAIGN OF FRAUD AND DECEIT RELATING TO THE HEALTH EFFECTS OF SMOKING AND THE ADDICTIVENESS OF SMOKING FOR NEARLY 50 YEARS.

The evidence of Philip Morris's decades-long campaign of fraud confirms the scope of its misleading and deceitful conduct, and that it was undertaken purposefully to preserve Philip Morris's extraordinary profits. Internal documents and witness testimony in the record in this case show that Philip Morris's entire business was predicated on its commitment to get the Jesse Williamses of the world to become and stay addicted to smoking Philip Morris's cigarettes. Philip Morris and its agents deceived and misled the public, *inter alia*, about the health effects of smoking, the addictiveness of smoking and the role of nicotine in that addiction. Contrary to its public statements, Philip Morris designed its cigarettes to ensure that its products delivered enough nicotine to create and sustain addiction across the broadest possible range of smokers.[3]

---

[3] A federal district court recently reached similar conclusions in an exhaustive, 1,683-page memorandum opinion, holding Philip Morris and other major tobacco companies liable for a far-ranging scheme to defraud under the federal racketeering laws. *United States v. Philip Morris USA Inc., et al.*, Civ. No. 99-2496 (GK), 2006 WL 2380622 (D.D.C. Aug. 17, 2006) (part 1 of 6) (full mem. op. available in pdf format at www.dcd.uscourts.gov).

1. Philip Morris's Statements Made During the Second Half of the Twentieth Century Denying That Smoking Was a Proven Cause of Disease Were Fraudulent.

Jesse Williams began smoking in about 1950, just at a time when early epidemiological studies linking smoking to disease began to emerge. To keep people like Jesse Williams smoking, Philip Morris, along with the other leading tobacco companies at the time, committed to undertake a "long-term" campaign that was "entirely 'pro-cigarettes'" to promote cigarettes and to defend them against the mounting evidence of their harms "and other attacks that may be expected in the future." Plaintiff's Exhibit 1 (hereafter "Pl. Exh. __"). Accordingly, in January 1954, Philip Morris, in conjunction with other tobacco companies, issued the "Frank Statement to Cigarette Smokers" in 448 newspapers around the country, including in Oregon. In the Frank Statement, Philip Morris stated, *inter alia*:

> -- "Distinguished authorities point out: . . . [t]hat there is no proof that smoking is one of the causes [of lung cancer]."
>
> -- "We accept an interest in people's health as a basic responsibility, paramount to every other consideration in our business."
>
> -- "We always have and always will cooperate closely with those whose task it is to safeguard the public health."
>
> -- "We are pledging aid and assistance to the research effort into all phases of tobacco use and health. . . . For this purpose we are

> establishing a joint industry group consisting initially of the undersigned. This group will be known as TOBACCO INDUSTRY RESEARCH COMMITTEE."

J.A. 202a-204a (Pl. Exh. 5). Philip Morris executives made similar public statements elsewhere over the years. *See id.* at 205a (Pl. Exh. 10; March 1954 statement in news service quoting Philip Morris Vice President that if Philip Morris had any thought or knowledge that cigarettes were harmful, "we would stop business tomorrow."); *id.* at 208a-210a (excerpt from Philip Morris's Second Request for Admissions).

The Frank Statement set forth the core themes for the fraudulent public relations campaign that Philip Morris, along with other tobacco companies, pursued for the next four decades – denying that smoking was a proven cause of disease, feigning a commitment to protecting the health of smokers, and touting its support for research that it claimed was intended to uncover the truth. As the evidence in this case demonstrates, each of these statements was knowingly false, misleading, deceptive, or otherwise fraudulent when made. Significantly, the statement that there was "no proof" that smoking was a cause of lung cancer was untrue. In fact, there was a growing body of credible scientific and medical evidence – pathological, clinical, chemical, and epidemiological – of the toxicity of cigarette smoke and smoking's role in causing lung cancer. *See, e.g.*, Pl. Exh. 12 (March 31, 1954 Memo from Philip Morris scientist to executive George Weissman that "several important, serious-minded . . . scientists have stated publicly that there is something harmful in tobacco smoke. I too can name several harmful ingredients. . . ."); *see also* Transcript Volume 11-A at 56 (testimony of Elizabeth Whelan, Ph.D.) (discussing retrospective studies of early 1950s); *id.* at 57-58 (discussing animal experiments of 1953); *id.* at 68-73 (explaining false

and deceptive nature of statements in the Frank Statement) (hereafter "Tr. Vol. __").

The egregious nature of Philip Morris's conduct is further demonstrated by its role in controlling and exploiting the Tobacco Industry Research Committee ("TIRC"), the purportedly independent research body whose creation was touted in the Frank Statement. From its formation, TIRC was primarily a tool in the public relations campaign and defense of lawsuits. *See* Pl. Exh. 104 (minutes of 1978 meeting of "ad hoc" committee at which industry lawyers acknowledged role of CTR as a "shield" and "front" to serve industry interests). TIRC, later renamed the Council for Tobacco Research ("CTR"), was designed to give the tobacco industry's denial of a causal link between smoking and cancer a patina of scientific legitimacy. Tr. Vol. 11-A at 92-93 (Whelan testimony). But the Board of Directors of TIRC/CTR was comprised exclusively of tobacco industry executives, and its activities were controlled by company employees and lawyers. For the entire 45 years of its existence, CTR never wavered from the tobacco industry's consistent public position, and CTR was used by Philip Morris and the other companies to administer and support research programs designed to bolster their public denials of smoking's harms. The most far-reaching of these programs, known as "CTR Special Projects," were studies requested and monitored by industry lawyers to bolster the defense of smoking and health lawsuits. *See, e.g.*, Pl. Exh. 104 (discussing CTR "special projects"). Moreover, Philip Morris's scientists who helped oversee CTR's work kept close watch to ensure that CTR did not support research that could undermine the public positions taken by Philip Morris. For example, in 1980, Director of Research Thomas Osdene, who was in charge of keeping alive the smoking and health "controversy" (J.A. 62a-63a) and rose to Vice President of Research in his 27 years at Philip Morris, wrote a memo to Philip Morris's Vice President of Research, urging that CTR

be directed to avoid research aimed at "developing new tests for carcinogenicity" or research that would "attempt to relate human disease to smoking." Pl. Exh. 108.

In early 1958, Philip Morris and other tobacco companies formed the Tobacco Institute ("TI") to take the lead role from CTR in coordinating and bolstering the tobacco industry's public relations efforts. Pl. Exh. 30. Philip Morris's Chief Executives served on TI's Board of Directors and its Executive Committee, including as TI's Chairman, and Philip Morris's General Counsel served on the powerful Committee of Counsel. Over the years, Philip Morris executives routinely served on the various TI committees that set the course for TI's efforts to promote the industry's interests. *See, e.g.*, Pl. Exh. 54 at 6-7.

By 1958, Philip Morris scientists had acknowledged to tobacco industry colleagues that smoking was a cause of disease. That year, scientists for a British tobacco company visited the United States and found nearly uniform acceptance of the causation conclusion among scientists at American tobacco companies, including Philip Morris:

> With one exception (H.S.N. Greene) the individuals whom we met believed that smoking causes lung cancer if by "causation" we mean any chain of events which leads finally to lung cancer and which involves smoking as an indispensable link. In the U.S.A. only Berkson, apparently, is now prepared to doubt the statistical evidence and his reasoning is nowhere thought to be sound.
>
> * * *
>
> The majority of individuals whom we met accepted that beyond all reasonable doubt cigarette smoke most probably acts as a direct

> though very weak carcinogen on the human lung. The opinion was given that in view of its chemical composition it would indeed be surprising if cigarette smoke were not carcinogenic. . . .

Pl. Exh. 28. Consistent with that understanding, in 1961 an internal scientific presentation documented Philip Morris's awareness of many known cancer-causing compounds in cigarette smoke. Pl. Exh. 42; *see also* JA 225a-228a (Pl. Exh. 53; March 25, 1964 memo noting that "the product design should include consideration of chemical carcinogens . . . .").

In 1964, the Advisory Committee to the United States Surgeon General issued its landmark report ("1964 Report") on smoking and health. The Committee's main scientific conclusion was that smoking is a cause of lung cancer in men. In reaching that consensus judgment, the distinguished Advisory Committee applied a rigorous set of causal criteria to the voluminous body of chemical, biological, pathological, clinical, and epidemiological evidence then available. *See* Pl. Exh. 159 (1964 Report).

If its statements that it would act to protect the health of its customers had been truthful, Philip Morris would have treated the 1964 Report as a clarion call to inform its customers of the scientific and medical evidence, and to stop telling the public that smoking was not proven to be harmful. Instead, Philip Morris viewed the 1964 Report as a threat to its market and profits. As longtime executive George Weissman told Chairman Joseph Cullman III in a confidential memorandum in the wake of the 1964 Report, Philip Morris now had to offer smokers "a psychological crutch and self-rationale to continue smoking." J.A. 221a-224a at 222a (Pl. Exh. 50). Statements like Weissman's show that the Frank Statement claim that smokers' health was "paramount" to Philip Morris was flatly false. Rather, Philip Morris

repeatedly and consistently acted to protect its profits, not its consumers. In fact, Philip Morris recognized that the impact of the 1964 Report was limited. By 1965, Philip Morris expected the temporary "backlog of youth" who had refrained from smoking in 1964 to ease, causing a "healthy increase in the number of new smokers" as those youth joined in with "this year's crop of prospects." Pl. Exh. 57.

Internally at Philip Morris, it was generally agreed that smoking was harmful to health. Philip Morris scientists recognized that there was no credible evidence to counter the overwhelming scientific and medical consensus that smoking causes cancer and other diseases. In this case, William A. Farone, Ph.D., the Director of Applied Research at Philip Morris from 1977-1984, testified that during his extensive orientation to all aspects of Philip Morris's scientific and manufacturing operations, no one at Philip Morris ever told him that cigarette smoking did not cause cancer. J.A. 66a. Dr. Farone also testified that while Philip Morris's approach to creating the "so-called controversy" was to attack other researchers' scientific support for the hypothesis that smoking causes disease, "I never heard anyone at Philip Morris say that they had any evidence to refute that hypothesis." *Id. See also United States v. Philip Morris USA*, 2006 WL 2380632 at *167-68 (part 2 of 6), Mem. Op. at 291-93 (quoting testimony from Dr. Farone that there was "widespread acceptance that smoking caused disease" among scientists at Philip Morris based on the compelling epidemiological and chemical evidence, and from another longtime Philip Morris scientist that he knew smoking was dangerous years before he began at Philip Morris in 1972 and that it was "common knowledge" within Philip Morris that smoking caused cancer, emphysema, and other diseases).

In direct contrast to its understanding of smoking's adverse effects reflected in internal documents, Philip Morris continued unabated its campaign of public deception. Both

independently and through CTR and the Tobacco Institute, Philip Morris told the public, and smokers in particular, that whether smoking caused disease at all remained a genuine "open controversy," and attacked as inconclusive the growing body of evidence proving that cigarette smoking causes disease. TI used a plethora of media – including television appearances, newspaper statements, and pamphlets – to disseminate its views broadly. *See, e.g.*, Pl. Exh. 161 (1974 TI press release; 1991 TI statement in newspaper article that "we don't know" whether smoking causes disease); Tr. Vol. 8-C at 149-53 (testimony of TI Vice President Director of Communications). For example, during an interview for a television report in 1976, the Vice President of Philip Morris expressed concern not that Philip Morris cigarettes were killing smokers, but that people were making such claims against cigarettes "without adequate knowledge. There has not been the sort of research really that would permit anyone to say that" smoking kills hundreds of thousands of people annually. Pl. Exh. 158. On the same show, senior Philip Morris scientist Helmut Wakeham stated that Philip Morris would not be in business if it believed smoking caused disease. *Id.*

The evidence further shows that TI coordinated its public relations efforts for maximum impact. The tobacco industry timed some of its biggest public relations initiatives to coincide with the release of Surgeon General's reports on smoking, in order to skew the media coverage to present the industry's view alongside the Surgeon General's conclusions, and thereby blunt the effect of those reports on the public, and the smoking public in particular. *See, e.g.*, J.A. 59a-60a (testimony of Richard Pollay regarding TI's activities in advance of the release of the 1964 Report). Thus, rather than cooperating with public health authorities, as promised in the Frank Statement and in subsequent pronouncements, Philip Morris worked actively to undermine public health efforts. *See also* Pl. Exh. 104 (joint industry meeting at which Philip

Morris executive touted industry's ability to anticipate, and "react immediately" to government activity on smoking and health issues).

In 1972, a Tobacco Institute official frankly acknowledged the industry's public relations strategy in an internal memo:

> For nearly twenty years, this industry has employed a single strategy to defend itself . . . it has always been a holding strategy, consisting of creating doubt about the health charge without actually denying it, advocating the public's right to smoke without actually urging them to take up the practice . . . encouraging objective scientific research as the only way to resolve the question of health hazard.

J.A. 240a (Pl. Exh. 83). The memo noted that the strategy had been "brilliantly conceived and executed." *Id.* The memo further noted that "In the cigarette controversy, the public – especially those who are present and potential supporters (*e.g.*, tobacco state congressmen and *heavy smokers*) – must perceive, understand, and believe in evidence to sustain their opinions that smoking may not be the causal factor." *Id.* (emphasis added). This shows that heavy smokers like Jesse Williams were an intended target of Philip Morris's public denials of smoking's harms. Moreover, the evidence in this case showed that the strategy worked: Jesse Williams looked to the tobacco industry as a legitimate source of information about cigarettes and as a credible counterweight to statements by the Surgeon General and other public health officials. *Id.* at 131a-133a, 138a, 153a.

Thus, Philip Morris's conduct should not be considered less reprehensible simply because at the same time Philip Morris was bombarding the public with false statements about the health effects of smoking, reputable scientific and medical bodies were making truthful public statements. Indeed, Philip Morris's efforts were intended to undermine the force of those public health pronouncements, and evinced singular indifference to and reckless disregard of the health or safety of smokers and the public.

In sum, Philip Morris recognized the evidence-based conclusions of the Surgeon General about the health effects of smoking decades before Jesse Williams died of lung cancer from smoking Marlboro cigarettes in 1997. Yet because the truth threatened its extraordinary corporate profits, Philip Morris spent vast sums to deceive the public – supporting public relations efforts to attack the conclusions of the Surgeon General and to falsely reassure smokers that the science was unsettled. In 1997 – 34 years after the landmark 1964 Surgeon General's Report – Philip Morris was still years away from publicly acknowledging its agreement with the scientific and medical consensus. Philip Morris's sustained effort to protect its profit stream by undertaking activities that were knowingly contrary to its understanding of tobacco's harms, and adverse to the interests of public health, makes Philip Morris's conduct here extraordinarily reprehensible.

2. Philip Morris Publicly Denied That Smoking and Nicotine Are Addictive While Intentionally Exploiting Nicotine's Addictive Properties to Keep People Smoking.

The systemic and intentional nature of Philip Morris's wrongdoing is equally evident in its approach to the issue of

smoking addiction and nicotine. As with disease causation, Philip Morris publicly denied that smoking was addictive and misleadingly omitted any acknowledgement of the role of nicotine. At the same time Philip Morris was issuing these public denials, in part to avoid FDA regulation of cigarettes, within Philip Morris's walls company officials directed scientists of many stripes – chemists, biochemists, psychologists, behavioral pharmacologists – to exploit the addictive properties of nicotine. Philip Morris actively took steps to maintain the physiological addictiveness of cigarettes in order to ensure that people would keep smoking. Philip Morris did this intentionally, even though it knew that nicotine addiction would impede smokers' ability to reduce the risk of developing smoking-related diseases by quitting.

Internal documents show that by the late 1950s, Philip Morris recognized that the drug nicotine was primarily responsible for keeping people smoking. One 1959 memorandum by a Philip Morris researcher put it bluntly: "I. WHY DO PEOPLE SMOKE? A. Physiological Reasons . . . 3) *Addiction*." Pl. Exh. 36 (emphasis added).

Philip Morris's view of nicotine's central importance to smoking was reiterated throughout the 1960s. *See, e.g.*, Pl. Exh. 57; Pl. Exh. 59. An internal document drafted by high-level scientist Helmut Wakeham in 1969 recognized the accepted view at Philip Morris that nicotine played the central, pharmacological role in keeping people smoking.

> We share the conviction with others that it is the pharmacological effect of inhaled smoke which mediates the smoking habit. . . .
>
> We have then as our first premise, that the primary motivation for smoking is to obtain the pharmacological effect of nicotine.

> In the past we at R & D have said that we're not in the cigarette business, we're in the smoke business. It might be more pointed to observe that the cigarette is the vehicle of smoke, smoke is the vehicle of nicotine, and nicotine is the agent of a pleasurable body response.

J.A. 229a (Pl. Exh. 72). Also in 1969, another leading nicotine researcher at Philip Morris asked in a confidential memo, "[D]o we really want to tout cigarette smoke as a drug? It is, of course, but there are dangerous F.D.A. implications to having such a conceptualization go beyond these walls." Pl. Exh. 67. This shows that Philip Morris believed nicotine to be a drug and treated it as such. It also shows that Philip Morris's concealment of its nicotine knowledge and research was motivated in substantial part by its desire to avoid regulation by the FDA, the federal agency charged with protecting the public health through oversight of drugs and the devices that deliver them.

In a 1972 "Confidential" report, Philip Morris's leading nicotine researcher, William Dunn, summarized a CTR-sponsored conference held on the Caribbean island of St. Martin. Dunn wrote:

> The majority of the conferees would go even further and accept the proposition that nicotine is the active constituent of cigarette smoke. Without nicotine, the argument goes, there would be no smoking. Some strong evidence can be marshalled to support this argument:
>
> 1) No one has ever become a cigarette smoker by smoking cigarettes without nicotine.

2) Most of the physiological responses to inhaled smoke have been shown to be nicotine-related.

Pl. Exh. 86. These documents show that Philip Morris fully understood the critical role of nicotine and considered it the lifeblood of the cigarette industry. As the Director of Research Osdene explained in 1980 when he listed nicotine research as a "major" R&D program, "My reason for this high priority is that I believe *the thing we sell most is nicotine*." J.A. 250a-251a (Pl. Exh. 109) (emphasis added).

As Dr. Farone, a former high-level researcher involved in cigarette design testified, at Philip Morris "*everything was focused on [] maintaining nicotine in smoke*." J.A. 67a (emphasis added). By November 1963, Philip Morris had noted that it had "the nicotine content of the cigarette under control." Pl. Exh. 46. Philip Morris's concern was to keep people addicted to smoking (J.A. 40a) – not with informing consumers about the nature of the product or relieving the nicotine addiction that caused smokers to inhale toxic smoke hundreds of times per day.

In the early 1980s, the leader of Philip Morris's active nicotine research program, William Dunn, acknowledged that the nicotine research was "a highly vexatious topic" for Philip Morris, because it was critical to the future success of the industry, yet "where our attorneys least want us to be." *Id.* at 247a (Pl. Exh. 106). Philip Morris saw the threat of product regulation by the FDA, an agency "known to have interests and powers antithetical to the interests of the industry. Any action on our part, such as research on the psychopharmacology of nicotine, which implicitly or explicitly treats nicotine as a drug could well be viewed as a tacit acknowledgement that nicotine is a drug." *Id.* Thus, if Philip Morris was "to study the drug nicotine, we must not be visible about it," and Philip Morris's lawyers would "likely

continue to insist on a clandestine effort in order to keep nicotine the drug in low profile." *Id.* at 248a-249a; *see also* Tr. Vol. 10-B at 123-24 (Farone testimony) (Philip Morris "has gone to great lengths to avoid having its product treated as a drug").

Accordingly, Philip Morris kept its extensive research program "clandestine." Philip Morris expended substantial resources studying nicotine, its chemical properties and physiological effects. Philip Morris sought to determine and deliver the "optimum" level and form of nicotine to deliver to smokers, and tested how to enhance the reinforcing properties of nicotine. The techniques that Philip Morris researched – and implemented in commercial brands, including Marlboro – included the use of chemicals in ways that Philip Morris concluded would enhance nicotine's physiological impact. Tr. Vol. 9-B at 43 (Farone testimony); Pl. Exh. 58; Pl. Exh. 142 ("Our laboratory has demonstrated that all forms of nicotine are not behaviorally or physiologically equal."). For example, in the early 1990s, Philip Morris studied nicotine's impact on brain activity, and determined that nicotine chemically treated with ammonia, a chemical base, reached the brain faster. J.A. 74a-75a (Farone testimony). One of the nicotine researchers, in a memo touting the accomplishments of the Electrophysiological Studies Research Group, wrote that the group's studies had shown "that there are optimal cigarette nicotine deliveries for producing the most favorable physiological and behavioral responses." Pl. Exh. 142. Philip Morris also explored ways to increase the nicotine content of cigarettes, as well as to increase the ratio of nicotine to tar in cigarettes beyond the ratio occurring naturally in tobacco. J.A. 214a-218a.

Indeed, Philip Morris indicated its willingness to conceal research results that showed nicotine's addictive properties. When a researcher proposed a study of nicotine withdrawal in rats, Philip Morris's Dunn stated: "If she is

able to demonstrate, as she anticipates, no withdrawal effects of nicotine, we will want to pursue this with some vigor. If, however, the results with nicotine are similar to those gotten with morphine and caffeine, we will want to bury it." *Id.* at 246a (Pl. Exh. 98).

Thus, Philip Morris knew that if its understanding and control of nicotine became known, it could be accused of affirmatively choosing to keep in its cigarettes the addictive agent responsible for causing the repeated inhalation of toxic tobacco smoke. As a Tobacco Institute memorandum acknowledged in 1980, "The entire matter of addiction is the most potent weapon a prosecuting attorney could have in a lung cancer/cigarette case. We can't defend continued smoking as 'free choice' if the person was 'addicted.'" *Id.* at 253a (Pl. Exh. 110). So Philip Morris (along with the rest of the tobacco industry) publicly denied that smoking was addictive, denied nicotine's pharmacological effects, and denied that it exercised broad control over the amount and form of nicotine delivered to smokers.

In 1988, the Surgeon General issued a report titled "The Health Consequences of Smoking: Nicotine Addiction" ("1988 Report"). Synthesizing the body of nicotine research that had been conducted in the wake of the 1964 Report, the Report affirmed the consensus view of all major scientific and medical organizations, including the American Psychiatric Association, the World Health Organization, and the National Institute on Drug Abuse, that cigarette smoking is a form of drug addiction primarily because of the dependence-producing drug nicotine. Pl. Exh. 159 (1988 Surgeon General's Report).

Consistent with the Surgeon General's core conclusions in 1988, Philip Morris had been aware for decades that the behavior is driven by the physiological need for the drug nicotine. Philip Morris was also well aware that

people who tried to stop smoking did experience significant physical withdrawal symptoms – a marker of physical dependence. For example, in March 1971, Philip Morris researchers issued a study on a quit-smoking campaign in Iowa, reporting the experiences of former smokers even months after quitting:

> This is not the happy picture painted by the Cancer Society's anti-smoking commercial which shows an exuberant couple leaping into the air and kicking their heels with joy because they have kicked the habit. A more appropriate commercial would show a restless, nervous, constipated husband bickering viciously with his bitchy wife who is nagging him about his slothful behavior and growing waistline.

Pl. Exh. 81.

Notwithstanding its decades of research and documented understanding about nicotine, Philip Morris's response to the 1988 Report was to deny that smoking is addictive and to deny that it controlled the amount of nicotine delivered by cigarettes. In 1994, when Philip Morris was trying to stave off a potential effort by FDA to regulate cigarettes, Philip Morris published a statement in the *New York Times* directed at "Smokers and Non-Smokers" titled "Facts You Should Know" that stated falsely that "Philip Morris does not 'manipulate' nicotine levels." *See* J.A. 272a (Pl. Exh. 148). The ad also stated that "Philip Morris does not believe cigarette smoking is addictive" because "[p]eople can and do quit smoking all the time." *Id.* As Philip Morris knew, the fact that people quit smoking has no bearing on whether it is addictive – an "inability to quit" using a drug is not and has never been part of any established scientific or medical definition of drug addiction. Moreover, Philip

Morris also knew that the success rate for people who try to quit smoking is appallingly low. *See, e.g.*, Pl. Exh. 144 (1992 memo to Philip Morris's CEO noting low success rate of available nicotine replacement therapies).

As the foregoing recitation of evidence shows, Philip Morris's decades-long course of fraud involved a stream of concerted, related actions, all designed to induce people to start smoking, to addict them to the nicotine in cigarettes, and to give addicted smokers a rationale to keep smoking. In so doing, Philip Morris acted with total and profound indifference to the health and safety of smokers. *See also* Sec. B, *infra*. This evidence provided further support for the extreme reprehensibility of Philip Morris's conduct.

B. PHILIP MORRIS'S CONDUCT CAUSED PHYSICAL HARM AND EVINCED EXTREME DISREGARD FOR THE HEALTH OF OTHERS.

Under *State Farm*, conduct that causes physical harm and that reflects a lack of regard for the health or safety of others is of a higher degree of reprehensibility. 538 U.S. at 419. In addition, a court may in certain circumstance consider evidence of similar wrongdoing that did not directly affect the plaintiff, because "such evidence may be relevant to the determination of the degree of reprehensibility of the defendant's conduct." *Gore*, 517 U.S. at 574 n.21 (citing *TXO Prod'n Corp. v. Alliance Resources Corp*, 509 U.S. 443, 462 n.28 (1993)); *State Farm*, 538 U.S. at 423 (other conduct that "replicates the prior transgressions" may be considered in assessing a punitive damage award).

In this case, Philip Morris's utter indifference and total disregard for the physical harm it knew resulted from its cigarettes – when they were used as Philip Morris intended for them to be used – is extraordinary by any measure. Moreover, the fraudulent activities that caused the harm in

this case were aimed not just at Jesse Williams, but at people throughout the United States.

Here, the evidence shows that Jesse Williams was heavily addicted to Philip Morris cigarettes. *See, e.g.*, J.A. 33a-35a (Benowitz testimony). As a result of that addiction, he first developed chronic bronchitis, and then died of lung cancer – a painful and invariably fatal disease – as a result of smoking Philip Morris's cigarettes. *Id.* at 122a-123a (testimony of primary physician diagnostician); *id.* at 141a (testimony of plaintiff concerning chronic bronchitis); *id.* at 155a-156a (testimony of oncologist).

The physical harm caused by Philip Morris's cigarettes was in no way limited to Jesse Williams. While Philip Morris filled its coffers on the sale of cigarettes to Jesse Williams and tens of millions of others, the consequences for the health of the American people were catastrophic. For at least 30 years, tobacco use has been the nation's leading, preventable cause of death.[4] Tobacco kills more than 400,000 people each year in the United States.[5] It causes nearly one out of every three deaths from cancer;[6] nearly one out of every five deaths from heart disease;[7] and

---

[4] U.S. Department of Health and Human Services, *The Health Consequences of Smoking: A Report of the Surgeon General – 1975* at iii (1975), available at www.cdc.gov/tobacco/sgr/index.htm.

[5] U.S. Centers for Disease Control and Prevention, *Annual Smoking-Attributable Mortality, Years of Potential Life Lost, and Economic Costs – United States 1995-1999*, Morbidity and Mortality Weekly Report 51(14): 300-03 (Apr. 11, 2002).

[6] American Cancer Society, *Cancer Facts & Figures 2005* (2005), available at www.cancer.org.

[7] U.S. Department of Health and Human Services. The Health Consequences of Smoking: A Report of the Surgeon General. Atlanta, GA: U.S. Department of Health and Human Services, Centers for Disease

87% of all lung cancer deaths.[8] Tobacco alone kills more people each year in the United States than AIDS, car accidents, alcohol, homicides, illegal drugs, suicides, and fires, combined.[9]

In 1965, 40.4% of adults, including over 50% of men, smoked in the United States. Pl. Exh. 159 (1989 Surgeon General's Report at 269). In 1999, the year of the trial and punitive damages award in this case, 23.5% of adults (46.5 million adults) in the United States were current smokers.[10] In Oregon in 1999, approximately 21.5% of adults smoked.[11] In that year, there were an estimated 158,900 lung cancer deaths and 171,600 new lung cancer cases in the United States. In Oregon, there were an estimated 2,100 lung cancer deaths and about 2,200 new lung cancer cases in 1999 – about six deaths and six new lung cancer cases each day.[12]

Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health (2004), available at www.cdc.gov/ tobacco/sgr/index.htm.

[8] American Cancer Society, *Cancer Facts & Figures 2005.*

[9] Lynch, B. S., and R. J. Bonnie, eds., *Growing Up Tobacco Free – Preventing Nicotine Addiction in Children and Youths, Committee on Preventing Nicotine Addiction in Children and Youths*, Division of Biobehavioral Sciences and Mental Disorders, Institute of Medicine, National Academy Press, Washington, DC, pp. 3-4 (1994), available at www.nap.edu/catalog/4757.html#toc.

[10] U.S. Centers for Disease Control and Prevention, *Cigarette Smoking among Adults – United States, 1999*, Morbidity and Mortality Weekly Report, 50(40):869-72 (Oct. 12, 2001).

[11] U.S. Centers for Disease Control and Prevention, *State-Specific Prevalence of Current Cigarette Smoking Among Adults and the Proportion of Adults Who Work in a Smoke-Free Environment – United States, 1999*, Morbidity and Mortality Weekly Report, Vol. 45(43): 978-82 (Nov. 3, 2000).

[12] American Cancer Society, *Cancer Facts & Figures 1999* (1999), available at www.cancer.org.

The numbers regarding addiction are similarly bleak. Seventy-seven to ninety-two percent of smokers satisfy established criteria for addiction.[13] Each year, about 30% of smokers make a serious attempt to quit smoking, and only about 3% succeed in remaining abstinent one year later, an abysmally low figure. *See* Tr. Vol. 4-B at 115 (testimony of Neal Benowitz, M.D.).[14] Most smokers attempt to quit smoking 3-5 times before succeeding. J.A. 32a (Benowitz testimony).

Philip Morris's indifference to the health and safety of smokers extended well beyond Jesse Williams. Documents in the court record in this case show that time and time again, Philip Morris chose to continue its campaign of concealment and deceit rather than publicly acknowledge the harm caused by its products and to take steps to protect the public health.

As noted above, in 1964 Philip Morris executives discussed the need to offer smokers "a psychological crutch and self-rationale to continue smoking" in the wake of the Surgeon General's Report. J.A. 222a. In 1978, Philip Morris's Director of Research Tom Osdene opposed the Tobacco Institute's commissioning a study regarding "excessive behaviors" because of the threat that the study "could alienate certain segments of the smoking population and *in today's climate we need to keep all the dedicated smokers we can.*" Pl. Exh. 102 (emphasis added). In addition, Osdene was concerned that "an admission by the industry that excessive smoking is bad for you is tantamount

---

[13] Nicotine in Cigarettes and Smokeless Tobacco Is a Drug and These Products Are Nicotine Delivery Devices under the Federal Food, Drug, and Cosmetic Act: Jurisdictional Determination, 61 Fed. Reg. 44619, 44833-34 (Aug. 28, 1996).

[14] *See also* U.S. Centers for Disease Control and Prevention, *Smoking Cessation During Previous Year Among Adults – United States, 1990 and 1991*, Morbidity and Mortality Weekly Report, 42(26):504-507 (July 9, 1993).

to an admission of guilt with regard to the lung cancer problem. This could open the door to legal suits in which the industry would have no defense." *Id.* The next year, Osdene criticized CTR projects that he considered too closely grounded in the view that smoking was a cause of disease, and that suggested nicotine was similar to other addictive drugs: "[W]e are in the process of digging our own grave. . . . I am very much afraid that the direction of the work being taken by CTR is totally detrimental to our position and undermines the posture we have taken to outsiders." Pl. Exh. 100. And in 1982, another longtime scientist commented that the ability of Philip Morris to "survive as a viable commercial enterprise" was threatened – not because its products addict and kill its users, but because it had no effective substantive response to the scientific conclusions about smoking's harms, and public health officials might gain the regulatory authority to examine cigarettes. Pl. Exh. 122.

Not only did Philip Morris deceive the American public about the addictive nature of nicotine (*see* Sec. A.2., *supra),* documents introduced into evidence in this case demonstrate that Philip Morris recognized that its ability to deliver sufficient nicotine to sustain smokers' addiction was critical to the company's continued economic well-being – even if those profits came at the expense of its customers' health. In 1983, research directors for several tobacco companies, including Philip Morris, met to discuss how to respond to a request for assistance on nicotine research from a public health research body, the Independent Scientific Committee on Smoking and Health ("ISC"). The researchers chose to stonewall the ISC rather than risk revealing their extensive understanding of nicotine: "[O]ur response to the ISC should be that we have nothing to offer [and] we have no idea as to a worthwhile research programme." The participants agreed that research on "the role of nicotine . . . in perpetuating the smoking habit" was a "particularly sensitive area for the industry" because

> [i]f any future study showed that nicotine either was, or was not associated with perpetuating the smoking habit, industry could well be called upon to reduce or eliminate nicotine from the product. (A heads we lose, tails we cannot win situation!). *We must not become involved in any collaborative study with the ISC.*

Pl. Exh. 124 (emphasis added). This document is yet another indication that Philip Morris's public promises to cooperate with public health officials on smoking and health matters were directly contrary to its approach in practice.

Philip Morris's understanding of the critical role of nicotine, and its singular focus on expanding its market share and protecting its extraordinary profits, also influenced its cigarette design activities. Jesse Williams' widow testified that, in an effort to reduce his smoking, Williams tried smoking Marlboro Light cigarettes. J.A. 135a. These are cigarettes that Philip Morris promoted as "light," allegedly because they registered lower levels of tar and nicotine on a standardized machine smoking test that the Federal Trade Commission ("FTC") mandated in the mid-1960s. As part of this "FTC Test," the smoking machine took a standard size puff at regular intervals, drawing smoke from the end of the cigarette through a pad. *Id.* at 41a-42a. The reported FTC tar and nicotine levels were calculated by analyzing and measuring the amount of residue that collected on the pad.

As Dr. Farone testified, Philip Morris knew that humans do not smoke like machines, because their smoking behavior is influenced by their need for nicotine. *Id.* at 71a. In fact, Philip Morris developed for internal testing purposes a machine whose puffing behavior was calibrated by measurements of human smokers. The machine, known as the "human smoking simulator," was intended to replicate

actual human smoking behavior – unlike the FTC Test. *Id.* This shows Philip Morris's awareness that the FTC tar and nicotine ratings bore little relation to the tar and nicotine yields actually received by smokers. Tr. Vol. 9-B at 28 (Farone testimony). Dr. Benowitz, one of the world's leading nicotine experts, testified about design features – such as ventilation holes placed on the filter and fast-burning cigarette paper – that exploited the FTC testing protocol by reducing the amount of smoke that travels through the collection pad, so that such cigarettes register lower tar and nicotine yields on the machine. J.A. 42a-43a.

Philip Morris saw the threat to its business if it made its "light" or "low tar" cigarettes to actually deliver low levels of nicotine. To avoid that threat, these cigarettes were intentionally designed to allow addicted smokers to easily obtain far greater amounts of nicotine than registered via the FTC test. J.A. 71a. Thus, smokers (like Jesse Williams) who tried a Marlboro Light because it was promoted as lower in tar could, though modest changes in smoking behavior, get the amount of nicotine they needed to sustain their addiction. And in so doing, these smokers got essentially the same amount of tar and other toxic substances as from brands with higher yields on the FTC Test. Tr. Vol. 4-B at 66-69 (Benowitz testimony).

Finally, the more than 70% of smokers who want to quit smoking have been adversely affected by Philip Morris's concealment of internal information about nicotine in another way. By concealing its research and conclusions regarding cigarette design and nicotine – notwithstanding its oft-renewed public promise to cooperate closely with "those whose task it is to safeguard the public health" – Philip Morris forestalled FDA regulation over cigarettes. To this day, there is no meaningful regulation of cigarettes.

As the foregoing review of certain of the record evidence in this case demonstrates, Philip Morris's tortious wrongdoing lies at the extreme end of any reasonable measure of reprehensibility. The nature, duration, scope, and impact of Philip Morris's actions differ in sheer magnitude from the failure to disclose the repainting of a car that the Court considered in *Gore*, or the bad-faith actions by an insurance company addressed in *State Farm*. Over the course of nearly a half-century, Philip Morris has taken conscious steps to optimize the addictive nature of its cigarettes, even though it has long known that its cigarettes cause lung cancer, emphysema, heart disease, and numerous other diseases. Rather than disclose to smokers and potential smokers its knowledge about the harm and addiction caused by its product, Philip Morris lied. Philip Morris's cigarettes have caused death, disease, and suffering for millions of Americans. Philip Morris's conduct at issue in this case warrants special condemnation. The punitive damages verdict against Philip Morris issued by the Oregon jury and upheld by the Oregon courts should stand.

CONCLUSION

For the foregoing reasons, and those presented by Respondent, the decision below should be affirmed.

Respectfully submitted,

WILLIAM B. SCHULTZ
(Counsel of Record)
ANDREW N. GOLDFARB
ZUCKERMAN SPAEDER LLP
1800 M Street, N.W.
Washington, D.C. 20036
(202) 778-1800
Attorneys for Amici Curiae

APPENDIX

APPENDIX A

INTERESTS OF AMICI CURIAE

Amicus Curiae the Campaign for Tobacco-Free Kids works to raise awareness that cigarette smoking is a public health hazard by advocating public policies to limit the marketing and sales of tobacco to children, and altering the environment in which tobacco use and policy decisions are made. Tobacco-Free Kids has over 100 member organizations, including health, civic, corporate, youth, and religious groups dedicated to reducing children's use of tobacco products.

Amicus Curiae the American Cancer Society, Inc. ("ACS") has over three million volunteers nationwide, including 50,000 physicians. The organization's mission is to eliminate cancer as a major health problem by preventing cancer, saving lives and diminishing suffering from cancer, through research, education, advocacy, and service. The organization was founded in 1913, and since that time has conducted groundbreaking research in identifying the use of tobacco products as a major cause of cancer, and educating the public about its deadly effects.

Amicus Curiae American Heart Association ("AHA") is a voluntary health organization founded in 1924 to reduce death and disability from cardiovascular diseases and stroke, which are the #1 and #3 largest killers of Americans. AHA is one of the world's premier health organizations, with 22.5 million volunteers and supporters in nearly 2,000 community organizations in the 50 states as well as in Washington, D.C., and Puerto Rico. The association invested more than $473.5 million in fiscal year 2004-05 for research, professional and public education, community service and advocacy so people across America can live stronger, longer lives. AHA has long

been active before Congress and regulatory agencies on tobacco and other health-related matters.

Amicus Curiae the American College of Chest Physicians ("ACCP"), founded in 1935, is an international medical society dedicated to providing postgraduate medical education for physicians, surgeons, and allied health professionals involved in the diagnosis and treatment of chest diseases. ACCP, and the more than sixteen thousand health care professionals it represents, help promote the prevention and treatment of diseases of the chest through leadership, education, research, and communication. ACCP publishes CHEST, a leading scientific journal featuring clinical research in pulmonary, critical care, sleep, and chest medicine disciplines. ACCP also advocates before government agencies and the courts, offering expert opinion on issues impacting cardiopulmonary health, including the effects of tobacco use, as our members see hundreds of thousands of death each year cause by tobacco usage.

Amicus Curiae the American College of Occupational and Environmental Medicine ("ACOEM"), based in Arlington Heights, Illinois, represents more than 6,000 physicians and other health care professionals specializing in the field of occupational and environmental medicine. Founded in 1916, ACOEM is the nation's largest medical society dedicated to promoting the health of workers through preventive medicine, clinical care, research, and education. ACOEM has been a strong advocate of policies and efforts that protect against exposure to environmental tobacco smoke in the workplace and elsewhere.

Amicus Curiae the American Association for Respiratory Care ("AARC") is a professional association with 40,000 members worldwide. The Association's primary membership consists of respiratory therapists, but also physicians, nurses, and other health care providers around the

world. AARC's members can be found in all areas of health care, working directly with patients to deliver life-saving and life-enhancing respiratory care.

Amicus Curiae the American Dental Hygienists' Association ("ADHA") is the largest national organization representing the professional interests of the nation's 120,000 dental hygienists. Dental hygienists are licensed health professionals dedicated to improving access to oral health care services. ADHA has long been active on tobacco control issues because regulation of tobacco products will help to prevent tobacco addiction and resulting morbidity and mortality. ADHA is the recipient of a grant from the Robert Wood Johnson Foundation's Smoking Cessation Leadership Center to launch a national campaign to promote smoking cessation.

Amicus Curiae the American Legacy Foundation is dedicated to building a world where young people reject tobacco and anyone can quit. The foundation was established in March 1999 as a result of the Master Settlement Agreement reached between the attorneys general in 46 states and five U.S. territories and the tobacco industry. The foundation develops programs that address the health effects of tobacco use through grants, technical assistance and training, youth activism, strategic partnerships, counter-marketing and grass roots marketing campaigns, research, public relations and outreach to populations disproportionately affected by the toll of tobacco.

Amicus Curiae the American Lung Association ("ALA") is one of the nation's oldest voluntary health organization, with volunteers and affiliates in all 50 states, the District of Columbia, Puerto Rico and the Virgin Islands. ALA has nearly 400,000 volunteers. Since cigarette smoking is a major cause of chronic obstructive lung disease, ALA has long been active in research, education and public policy

advocacy on the adverse health effects of tobacco products. ALA has advocated for the regulation of tobacco products for more than two decades.

Amicus Curiae the American Public Health Association ("APHA") was founded in 1872 and is the oldest, largest and most diverse organization of public health professionals in the world. The association aims to protect all Americans and their communities from preventable, serious health threats and strives to assure community-based health promotion and disease prevention activities and preventive health services are universally accessible in the United States. APHA represents a broad array of health providers, educators, environmentalists, policy-makers and health officials at all levels working both within and outside governmental organizations and educational institutions.

Amicus Curiae the American Society of Addiction Medicine ("ASAM") is a national medical specialty society of over 3,000 physicians dedicated to improving the treatment of alcoholism and other addictions, educating physicians and medical students, promoting research and prevention, and informing the medical community and the public about these important issues.

Amicus Curiae the American Thoracic Society ("ATS"), founded in 1905, is an independently incorporated, non-profit, educational and scientific organization of physicians and scientists that focuses on respiratory and critical care medicine. ATS has approximately 13,500 dues-paying members around the world, who help prevent and fight respiratory disease internationally through research, education, patient care, and advocacy. The long-range goal of ATS is to decrease morbidity and mortality from all respiratory disorders and life-threatening acute illnesses. Although ATS members work on diverse issues, all share an

interest in tobacco use prevention, tobacco cessation and the treatment of tobacco-related disease.

Amicus Curiae the Lung Cancer Alliance, founded in 1995, is the only national non-profit organization dedicated exclusively to support, education and advocacy for lung cancer patients, caregivers, survivors and for the 45 million former smokers and others at risk for developing lung cancer.

Amicus Curiae the National Association of Local Boards of Health ("NALBOH") is the grassroots of public health and the national voice for effective and competent public health governance. Its mission is to strengthen and prepare local boards of health, enabling them to protect and promote the health of their communities, through education, technical assistance, and advocacy. NALBOH has been engaged in establishing a significant voice for local boards of health on matters of national public health policy, including tobacco use prevention and control. NALBOH's satellite office in Washington, D.C., has allowed it to have a permanent presence with other national public health organizations, while maintaining its grassroots with its main office in Bowling Green, Ohio.

Amicus Curiae the National Research Center for Women & Families is a nonprofit, nonpartisan organization that is dedicated to improving the lives of adults and children. NRC promotes the health and safety of women, children, and families, by using objective, research-based information to encourage new, more effective programs and policies. The Center achieves its mission by gathering and analyzing information and translating that information into clearly presented facts and policy implications that are made widely available to the public, the media, and policy makers.

Amicus Curiae the National Latino Council on Alcohol and Tobacco Prevention ("LCAT") is a non-profit,

national organization created in 1989 by a group of Latino public health professionals and community advocates from throughout the United States. LCAT is unique since it is the only Latino national organization dedicated to reducing the harm caused by alcohol and tobacco in the Latino community through research, advocacy, policy analysis, community education, training and information dissemination.

Amicus Curiae the Society for Research on Nicotine and Tobacco is the leading international organization for scientists doing work in the areas of nicotine and tobacco research. The mission of the Society is to stimulate the generation of new knowledge concerning nicotine in all its manifestations, from molecular to societal. The Society has three main aims: to sponsor scientific meetings and publications fostering the exchange of information on nicotine and tobacco; to encourage scientific research on public health efforts for the prevention and treatment of tobacco use; and to provide a means by which legislative, governmental, regulatory and other public agencies can obtain expert advice and consultation on nicotine and tobacco.